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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 TWO GUYS, INC., a Washington
11 Corporation, a.k.a. FRANCHISE
12 INFUSION, INC.,

13 Plaintiff,

14 v.
15 NICK-N-WILLY'S FRANCHISE
16 COMPANY, LLC, a Colorado limited
17 liability company; and RICHARD WEIL,
18 a Colorado resident,

19 Defendants.

20 CASE NO. C11-5537BHS

21 ORDER GRANTING
22 DEFENDANTS' MOTION TO
23 DISMISS

24 This matter comes before the Court on Defendants Nick-N-Willy's Franchise
25 Company, LLC, and Richard Weil's ("Defendants") motion to dismiss, compel
26 mediation, or to transfer venue (Dkt. 8). The Court has reviewed the briefs filed in
27 support of and in opposition to the motion and the remainder of the file and hereby grants
28 the motion to dismiss for the reasons stated herein.

29 **I. PROCEDURAL HISTORY**

30 On March 25, 2011, Plaintiff Two Guys, Inc., a.k.a. Franchise Infusion, Inc. ("Two
31 Guys") filed a complaint against Defendants in Clark County Superior Court for the State
32 of Washington. Dkt. 1, ¶ 1. Two Guys seeks rescission of an Area Developer Marketing

1 Agreement (“ADM”), which includes a provision that requires mediation before a legal
2 action may be filed. Dkt. 9, Declaration of Richard J. Whittemore, Exh. 1, § 19.2.

3 On July 14, 2011, Defendants removed the matter to this Court. Dkt. 1.

4 On July 21, 2011, Defendant filed a motion to dismiss, compel mediation, or to
5 transfer venue. Dkt. 8. On September 7, 2011, Two Guys responded. Dkt. 11. On
6 September 9, 2011, Defendants replied. Dkt. 12.

7 II. DISCUSSION

8 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
9 Procedure may be based on either the lack of a cognizable legal theory or the absence of
10 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901
11 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the
12 complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301
13 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed
14 factual allegations but must provide the grounds for entitlement to relief and not merely a
15 “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.*
16 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege “enough facts to state a
17 claim to relief that is plausible on its face.” *Id.* at 1974.

19 In this case, the ADM explicitly requires mediation before any party may file a
20 legal action under the agreement. Two Guys has failed to allege that they participated in
21 mediation. Therefore, the complaint lacks a cognizable legal theory for breach of
22 contract.

23 With regard to Two Guys’ response brief, the request to remand the matter back to
24 state court is meritless for numerous reasons. The request is also improperly presented in
25 a responsive brief. Therefore, the Court denies Two Guys’ request to remand.
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III. ORDER

It is hereby **ORDERED** that Defendants' motion to dismiss, compel mediation, or to transfer venue (Dkt. 8) is **GRANTED** and this action is **DISMISSED**. The Clerk is directed to enter judgment for Defendants.

DATED this 3rd day of October, 2011.



BENJAMIN H. SETTLE
United States District Judge